

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA ALLEN KANE,

Defendant and Appellant.

B208799

(Los Angeles County
Super. Ct. No. TA089227)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed in part, reversed in part and remanded.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joshua Allen Kane of carjacking, second degree robbery, possession of a firearm by a felon and resisting arrest and found true several special allegations, including that each of the offenses was committed for the benefit of a criminal street gang. On appeal Kane contends the evidence is insufficient to support the jury's findings concerning the gang-enhancement allegations. We agree and reverse the judgment and remand for resentencing. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

An information charged Kane with carjacking (Pen. Code, § 215, subd. (a))¹ (count 1), robbery (§ 211) (count 2), possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 3)² and two counts of resisting an executive officer in the performance of his or her duty (§ 69) (counts 4 and 5). The information specially alleged as to counts 1 and 2 that Kane had personally used a firearm within the meaning of section 12022.53, subdivision (b). It was also specially alleged as to counts 1 through 5 that each offense was committed to benefit a criminal street gang (§ 186.22, subd. (b)).³ Kane pleaded not guilty and denied the special allegations.

¹ Statutory references are to the Penal Code.

² In connection with this count, the information alleged Kane had suffered two prior felony convictions in 2006 for drug-related offenses.

³ For simplicity on occasion this opinion uses the shorthand phrase “to benefit a criminal street gang” to refer to crimes that, in the statutory language, are committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b).)

2. The Evidence at Trial

a. The crimes

According to the evidence at trial, Kane walked up to Dejuan Wilson in the parking lot of the Del Amo Plaza Indoor Swap Meet in Compton, pulled out a gun, demanded that Wilson “give him all he got,” took Wilson’s keys and cellular telephone from his belt and drove away in Wilson’s Dodge Neon. The crimes were captured on the market’s video cameras and the videotapes were played for the jury. The videotapes showed that, as Kane turned out of the parking lot in the Dodge Neon, two men ran up to the car, opened the doors and jumped in; then, the three men drove away together.

Several hours after the carjacking and robbery, two police officers, both in uniform and in a marked patrol car, saw the Dodge Neon. When the patrol car moved into the lane directly behind the Dodge Neon, the driver of the Dodge Neon sped away, accelerating at high speed through two stop signs before reaching a dead-end area in the Jordan Downs Housing Development, a stronghold of the Grape Street Crips, a criminal street gang. Three men ran from the car. The patrol officers apprehended Kane, who lived one block from where he was detained. The other two men who had fled the Dodge Neon during the chase were never found or identified. During his arrest, Kane swung his arms in an effort to break free from one officer, then jerked his body and kicked another officer as the officer was guiding him to the patrol car. Kane told the officers he did not want to go back to jail.

b. Expert testimony on criminal street gangs

Kane admitted to police officers he is an active member of the Grape Street Crips. Los Angeles Police Officer Daniel Pearce, who was assigned to a gang enforcement detail and familiar with the Grape Street Crips gang and their crimes, testified as an expert on gang culture. Pearce explained the Grape Street Crips is a violent criminal street gang. Its primary activities are crimes of violence, including carjackings, robberies and murders. Given a hypothetical set of circumstances resembling the facts in this case, Pearce opined each of one of the charged offenses as explained in the hypothetical was committed for the benefit of the criminal street gang.

According to Pearce, gang members commit carjackings to obtain a vehicle that cannot be traced to them: “The fruit of your crime is the car itself. You have a car in your possession that’s not registered to you. It’s not owned by you. It’s not owned by your family, by your friends, so you have a vehicle you can go do whatever you want. Now, for gang members that means drive-by shootings, transportation of narcotics, burglaries, robberies. You have an escape vehicle that you can use at any point in time to run from the police or do whatever you want and there’s no way to trace that car back to you.” The fact the car was located at the Jordan Downs Housing Development, a Grape Street Crips stronghold, is significant, Pearce explained, because it suggests the driver was joyriding with his friends and basically “showing off the[] trophy of what they took for the day.”

The robbery of the cellular telephone, Pearce opined, benefits the gang for similar reasons. “He can use the cell phone for a couple of reasons. One, a lot of times gang members will . . . steal cell phones so they can make their calls when they are directing their hits, directing their narcotics [transactions] because there is no way to trace that cell phone back to them . . . so absolutely it benefits the gang.” Also, Pearce testified, the robbery, accomplished with the use of the gun, raises the gang’s prestige and level of fear it inspires in the community, which itself benefits the gang and its criminal activities.

As to the felon-in-possession offense, Pearce testified a gang member who is willing to carry a gun after having a felony conviction earns “more respect from his gangster friends because he is putting more on the line.” Resisting arrest also raises a gang member’s prestige within the gang because the gang member gets “more respect by fighting with the police.”

Officer Pearce explained it is of little significance that a Grape Street Crips gang member committed the crimes without identifying himself as a gang member. Pearce testified, in most carjackings and robberies by Grape Street Crip gang members, the gang members typically do not wear their traditional purple color (the color used to identify the gang) or identify themselves as gang members. “They don’t do anything that is going to lead the police back to them . . . by throwing up their gang and their hood so that [the]

chance of them getting caught is much higher.” In addition, Pearce testified, the police and neighbors in the area know the gang members; there is no need for a gang member to identify himself.

3. *The Verdict and Sentence*

The jury convicted Kane on each count charged in the information and found true the firearm-use and criminal-street-gang-enhancement allegations.⁴ The court sentenced Kane to an aggregate state prison term of 30 years to life.⁵

DISCUSSION

1. *Standard of Review*

Section 186.22, subdivision (b)(1), provides “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” shall be punished pursuant to that section. Kane contends

⁴ As a formal matter, the criminal street gang allegations as to count 1, pursuant to section 186.22, subdivision (b)(4), invoke an alternative penalty provision, not a sentence enhancement. (See *People v. Jones* (2009) 47 Cal.4th 566, 576.)

⁵ Because the carjacking was found to have been committed to benefit a criminal street gang, the court sentenced Kane pursuant to section 186.22, subdivision (b)(4)(B), to an indeterminate term of 15 years to life on count 1, plus 10 years for the personal use of a firearm pursuant to section 12022.53, subdivision (b). The court imposed the upper term of five years for the robbery charged in count 2, plus 10 years for the criminal street gang enhancement (§ 186.22, subd. (b)(1)(C)) and an additional 10 years for the firearm-use enhancement. The court ordered the sentence on count 2 to run concurrently with the sentence on count 1. On each of counts 3, 4 and 5 the court imposed consecutive terms of one-third the middle term of 24 months, plus one-third the three-year middle term for the section 186.22, subdivision (b)(1)(A) criminal street gang enhancement.

The sentence on count 3, the initial determinate term ordered to run consecutively to the indeterminate term imposed on count 1, should have been computed without reference to the term imposed on count 1—that is, it should not have been calculated as a subordinate term pursuant to section 1170.1, subdivision (a). (See Cal. Rules of Court, rule 4.451(a); see also *People v. Neely* (2009) 176 Cal.App.4th 787, 796-800.) Because we remand for resentencing without imposition of additional terms for the criminal street gang enhancements, which will eliminate the indeterminate term on count 1, there is no need to separately correct this error.

there was insufficient evidence to support the jury's finding he committed each of the offenses to benefit a criminal street gang.

In reviewing a claim the evidence is insufficient to support a conviction or enhancement in a criminal case, we determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the defendant guilty of the offense or the enhancement beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Holt* (1997) 15 Cal.4th 619, 667.) “The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. *Substantial Evidence Does Not Support the Jury’s Findings on the Gang-enhancement Allegations*

An increased sentence pursuant to section 186.22, subdivision (b), requires a jury finding that the crime was committed for the benefit of a criminal street gang and with the specific intent to promote the criminal street gang. The only evidence on the issue was provided by the People’s expert witness, Officer Pearce. Kane contends the evidence is insufficient as a matter of law to support the jury’s finding he committed the crimes to benefit a criminal street gang and asks that we remand the matter for

resentencing.⁶ The People insist Pearce’s expert testimony, together with the undisputed facts that Kane is a member of Grape Street Crips and the stolen car was driven to the Jordan Downs Housing Development in Grape Street Crips territory, are sufficient to support the verdict.

It is, of course, perfectly permissible for an expert on gang culture to testify, through the use of a hypothetical properly rooted in the evidence, how particular criminal conduct may enhance a gang’s reputation or benefit the gang. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3; *People v. Ward* (2005) 36 Cal.4th 186, 209; *People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Officer Pearce did that in this case and plausibly explained how each of the crimes committed by Kane could benefit the Grape Street Crips criminal street gang. However, gang members can and do commit crimes for personal reasons not intended to benefit the gang. (See *People v. Ramon* (2009) 175 Cal.App.4th 843, 851; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196, 1199; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) The fact the person who perpetrates a crime happens to be a gang member does not establish that the crime itself was committed with the specific intent to promote the gang or further its objectives. (See *Gardeley*, at pp. 623-624 [membership in a gang alone is not sufficient to establish violation of § 186.22, subd. (b)]; *In re Frank S.*, at p. 1196 [§ 186.22, subd. (b)(1), “does not criminalize mere gang membership” without proof of the predicates for the enhancement]; *Morales*, at p. 1198 [gang members can commit crime “on a frolic and detour unrelated to the gang”].)

While Kane may have been acting with the specific intent to promote, further or assist criminal conduct by the Grape Street Crips when committing the crimes at issue in this case, there is nothing in the record that would permit Officer Pearce to reach that

⁶ The maximum aggregate determinate sentence Kane faces for the five substantive crimes and related firearm-use enhancements is 26 years 4 months, rather than the 30-years-to-life sentence imposed by the trial court.

conclusion.⁷ (See *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110 [“[a]n expert’s opinion which rests upon guess, surmise or conjecture, rather than relevant probative facts, cannot constitute substantial evidence”]; *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [“[g]enerally, an expert may render opinion testimony on the basis of facts given ‘in a hypothetical question that asks the expert to assume their truth,’”] provided the hypothetical is rooted in the evidence; however, “the expert’s opinion may not be based ‘on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors’”]; see also *People v. Gardeley, supra*, 14 Cal.4th at p. 618 [“like a house built on sand, the expert’s opinion is no better than the facts on which it is based”]; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 [“an expert’s opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities”].)

In this case there was no evidence to suggest Kane was actually motivated by any of the factors Office Pearce proposed in explaining why the crimes were intended to promote the activities of the Grape Street Crips. For example, Pearce testified gang members commit carjackings to acquire a car that can be used by the gang for criminal activity. However, there was no evidence any of the other men riding with Kane was a

⁷ The Supreme Court has granted review in a case from Division Six of this court to determine whether substantial evidence supports convictions under section 186.22, subdivision (a), (active participation in criminal street gang) and true findings with respect to enhancements under section 186.22, subdivision (b), based on a gang expert’s testimony that three gang members who raped a young woman in concert committed their crimes to benefit a criminal street gang. (*People v. Albillar*, review granted Aug. 13, 2008, S163905.) The Court’s opinion may restrict the scope of permissible testimony from gang experts with respect to the required showing under section 186.22 that a crime was committed to benefit a criminal street gang and may also provide guidance as to the type and extent of evidence, in addition to an expert’s testimony, necessary to establish a crime is sufficiently gang-related to support a criminal street gang enhancement.

gang member or that the car was used for gang activity as opposed to “a frolic and detour unrelated to the gang.” (See *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.)

Although Pearce testified stealing a car would elevate Kane’s status in the gang and the gang’s status in the community, there was no evidence anyone in the gang knew he stole the car. Wilson, the victim of the carjacking and robbery, testified he did not know Kane was a gang member; and Kane never identified himself as a gang member in committing any of the charged crimes.

Similarly, although Officer Pearce testified gang members steal cellular telephones to make criminally related telephone calls that cannot be traced back to them, nothing in the record shows the cellular telephone was used for any calls. Moreover, although Pearce testified the acquisition of the cellular telephone in connection with a robbery could raise a gang member’s status in the gang, there is no evidence that any member of the gang knew the cellular phone had been stolen or that Kane had told any other member he had accomplished that crime.

Officer Pearce’s testimony that a felon in possession of a firearm earns greater respect in the gang community is also insufficient to support the gang enhancement finding on that count because there was no evidence that any one (other than Wilson) knew Kane possessed a gun (and Wilson did not know Kane was a gang member). Likewise, Pearce’s testimony that Kane may have resisted arrest to bolster both his reputation in the gang and the gang’s reputation in the community is insufficient when there was no evidence of any witnesses to the arrest and the arresting officers acknowledged Kane explained to them he resisted because he did not want to go back to jail.

The People assert the fact the car was driven to the Jordan Downs Housing Development, a stronghold of Grape Street Crips, is sufficient, along with Pearce’s testimony, to support the jury’s gang enhancement findings on each of the counts. Whatever evidentiary support that evidence might provide in other circumstances, Kane lived in the area of the Jordan Downs Housing Development. His flight to that location offers no evidence of his specific intent to steal the car to benefit the gang. The presence

of two other men with him at the time of the crime and at the time of his arrest is also inconsequential because there was no evidence either man was a gang member.

In sum, the expert testimony of Kane’s possible motive or reason for committing the carjacking and robbery and thereafter resisting arrest, bereft of any supporting evidence, was insufficient to support the jury’s findings on the criminal street gang allegations. (See *People v. Ramon*, *supra*, 175 Cal.App.4th at p. 853 [“[T]o sustain the People’s position, we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang. Such a holding would convert section 186.22, subd. (b)(1), into a general intent crime. The statute does not allow that.”]; see also *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658-659 [improper for expert to opine on whether a “specific individual had specific knowledge or possessed a specific intent”; because expert’s testimony provided the only evidence of this element of the criminal street gang allegation, it “did nothing more than inform the jury how [the expert] believed the case should be decided”]; *In re Frank S.*, *supra*, 141 Cal.App.4th at pp. 1197-1198 [“Similar to *Killebrew*, the expert in this case testified to ‘subjective *knowledge and intent*’ of the minor. [Citation.] ‘Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action’”].)⁸

⁸ In light of our holding the criminal street gang findings were not supported by substantial evidence, it is not necessary to consider Kane’s alternative contention the court violated section 654 by imposing separate gang enhancements for each crime he committed. (Cf. *People v. Rodriguez* (2009) 47 Cal.4th 501, 507 [court declines to decide “whether section 654 applies to sentence enhancements that are based on the nature of the offense”].)

DISPOSITION

The judgment is reversed with respect to the gang enhancement findings on all counts and the matter remanded for resentencing. In all other respects, the judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON J.